Supreme Court, U. S.
FILED
APR 6 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1978

No. 78-1376

DRESSER INDUSTRIES, INC.,
Petitioner,

v.

COMMUNITY TELEVISION SERVICES, INC.,
Respondent.

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

DAVENPORT, EVANS, HURWITZ
& SMITH
ELLSWORTH E. EVANS
DEMING SMITH
EDWIN E. EVANS
National Reserve Building
Sioux Falls, South Dakota 57102

Attorneys for Respondent
Community Television Services, Inc.

April 6, 1979

O'CONNOR PRINTERS [redacted] 7 SIOUX FALLS, S. D.

INDEX

	Page
RESPONDENT'S BRIEF IN OPPOSITION	1
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions, Statutes and Regulations Involved	2
Statement of the Case	2
Reasons Why the Writ Should be Denied	4
I. The Issues Sought To Be Raised By Petitioner Are Not Of Sufficent Breadth Or Importance to Warrant Review By This Court	4
II. In Any Event, The Court Of Appeals Gave Full Consideration To The Issues Before It And Decided Them Correctly	6
III. The Issues Presented By The Petitioner Were Not Properly Raised or Preserved Below	11
Conclusion	12

TABLE OF AUTHORITIES

Cases	Page
AES Technology Systems, Inc. v. *Coherent Radiation*, 583 F.2d 933 (7th Cir. 1978)	6
Dick v. *New York Life Ins. Co.*, 359 U.S. 437 (1959)	5
Drier v. *Perfection, Inc.*, ____S.D.____, 259 N.W.2d 496 (1977)	6, 7, 11
Graver Tank & Mfg. Co. v. *Linde Air Products Co.*, 336 U.S. 271 (1949)	5
S-C Industries v. *American Hydroponics System, Inc.*, 468 F.2d 852 (5th Cir. 1972)	8
Swenson v. Chevron Chemical Co., ____*S.D.*____, 234 N.W.2d 38 (1975)	7
United States v. *Johnson*, 268 U.S. 220 (1925)	5

Statutes

28 U.S.C. §1332 2
Comment 3, UCC §2-313 6
SDCL 57-3-4 11
SDCL 57-4-26 ..... 6, 9

IN THE

Supreme Court of the United States

October Term 1978

No. 78-1376

DRESSER INDUSTRIES, INC.,
Petitioner,

v.

COMMUNITY TELEVISION SERVICES, INC.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Community Television Services, Inc. ("Community"), respectfully requests that the Petition for Writ of Certiorari seeking review of the opinion and judgment of the Court of Appeals for the Eighth Circuit be denied.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 586 F.2d 637 (8th Cir. 1978) and is set out in Petitioner's Appendix A. The order of the Court of Appeals denying rehearing en banc is set out in Petitioner's Appendix B. The opinion of the District Court is reported at 435 F.Supp. 214 (D.S.D. 1977) and is set out in Petitioner's Appendix C.

JURISDICTION

Respondent accepts the jurisdictional statement of Petitioner.

QUESTIONS PRESENTED

1) Whether the District Court and Court of Appeals erred in finding that the jury verdict in this diversity case was supported by substantial evidence and in finding under state law that the terms of a printed disclaimer should not preclude or limit recovery by the Respondent for the Petitioner's breach of express warranty.
2) Whether the issues presented by the Petitioner were properly raised and preserved below.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

No constitutional provisions or federal statutes or federal regulations are involved in this matter. South Dakota law controls. *See* Petitioner's Appendix D.

STATEMENT OF THE CASE

This action arises out of the collapse of a television tower during a winter storm. The owner, Community, sued Dresser Industries, Inc. ("Dresser"), which designed, fabricated and erected the tower. Diversity jurisdiction was present under 28 U.S.C. §1332.

The case was tried to a jury. The evidence showed that in purchasing the tower, Community relied upon Dresser sales literature declaring:

> "Properly designed towers will safely withstand the maximum wind velocities and ice loads to which they are likely to be subjected. Dresser - Ideco can make wind and ice load recommendations to you for your area based on US Weather Bureau Data. Exhibit 1 at 15.
>
> Some of the Dresser - Ideco towers . . . have been in service since the very first days of television. In the winter, loaded with ice and hammered repeatedly with gale force winds, these towers absorb some of the toughest punishment that towers take anywhere in the country . . . yet continue to give dependable uninterrupted service." Exhibit 1 at 2.

In addition, technical specifications in the sales order required a "Design Wind Load" for the tower at 60 pounds per square foot ("psf") on flat surfaces, which translates to an actual wind velocity of 120 miles per hour (Exhibits 1, 2, 26).

Expert witnesses for both parties agreed that at the time of the collapse, the wind velocity was far below the design capacity of the tower. Community's experts testified that although each individual component of the tower conformed in a mathematical sense to the 60 pounds psf specification, the performance capacity of the structure as a whole was deficient. They concluded that the high winds caused "mechanical resonance" which resulted in the tower collapse (R 642-657, 1012-1016, 1154-1156).[1]

The jury found Dresser liable for breach of express warranty (R 1932-1933) and assessed damages in the amount of $1,385,001.61. The District Court denied Dresser's post-trial motions subject to a remittitur to $1,274,631.60.[2] Community consented to this remittitur.

Dresser claimed on appeal: (1) insufficiency of the evidence; and (2) a printed disclaimer on the reverse side of the Dresser sales order precluded liability. The Eighth Circuit affirmed:

> "We conclude that there is sufficient evidence to support the finding that Dresser breached its warranty that the tower, when free from defects in materials and workmanship and properly designed for its location, would withstand the wind and ice loads to which it would normally be subjected. The terms and conditions of sale in the written contract

---

[1] References will be made to Petitioner's Appendix [A] if possible and to the record [R] in all other instances.

[2] The trial court concluded that the verdict was excessive to the extent that the jury erred in computing the amount of depreciation for the destroyed tower, antenna and buildings.

> do not apply to the warranty, and therefore cannot limit Dresser's liability for its breach." 586 F.2d 637, 643 [A 14].

On petition for rehearing en banc, Dresser advanced all of the claims it makes here, including the argument that the Eighth Circuit's opinion was not supported by the trial record and therefore deprived Dresser of its right to trial by jury. The full Court of Appeals rejected these contentions and denied the petition. Although Chief Judge Gibson dissented from the denial, he agreed that there was sufficient evidence to establish breach of warranty:

> "In my view, the evidence was sufficient to uphold the jury verdict of liability based on breach of the express warranty contained in the written contract. Since I believe the evidence supported a finding of liability on at least one theory, it would be counterproductive to rehear the question of liability." 586 F.2d at 644 (Gibson, J., dissenting) [A 17].

Judge Gibson's only basis for disagreement with the majority was that, under South Dakota law, the limitation of liability provision in the printed disclaimer was applicable.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Issues Sought To Be Raised By Petitioner Are Not Of Sufficient Breadth Or Importance To Warrant Review By This Court.

None of the usual factors that might impel this Court to review the decision below are present. No questions of constitutional or federal statutory law are presented; nor is there any conflict among the courts of appeal; nor are the issues involved likely to be recurring. Rather this is a diversity action that turns entirely upon the unique facts of this case and upon the interpretation of the particular contract involved. Only questions of state law are at issue, and no one, other

than the litigants themselves, will be affected by the outcome.

Further review by this Court would only involve the examination of proper evidentiary rulings, and of findings derived from a complex factual setting, supported by substantial evidence. In essence, Petitioner seeks a fourth review of a lengthy trial record already reviewed once by the District Court and twice by the Eighth Circuit. As this Court has oft repeated, "We do not grant certiorari to review evidence and discuss specific facts." *United States* v. *Johnson*, 268 U.S. 220, 227 (1925); *see also, Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

In an effort to create a constitutional question where none exists, Petitioner urges that the decision below violates its Seventh Amendment right to trial by jury. A similar argument was rejected by Mr. Justice Frankfurter in his dissent in *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437 (1959):

> "If this case raises a question under the Seventh Amendment, so does every granted motion for dismissal of a complaint calling for trial by jury, every direction of verdict, every judgment notwithstanding the verdict. Fabulous inflation cannot turn these conventional motions turning on appreciation of evidence into constitutional issues, nor can the many diversity cases sought to be brought here on contested questions of evidentiary weight be similarly transformed by insisting before this Court that the Constitution has been violated. This verbal smoke screen cannot obscure the truth that all that is involved is an appraisal of the fair inferences to be drawn from the evidence." 359 U.S. at 455-456.

II. In Any Event, The Court of Appeals Gave Full Consideration To The Issue Before It and Decided Them Correctly.

A. *Breach of Express Warranty.* The Eighth Circuit properly held that the technical design wind load specification contained in the sales order was supplemented by the Dresser sales literature "to promise more than mere compliance with technical measurements." 586 F.2d at 640 [A 6].

> "We find that the statements in the advertising catalog, which supplement the wind loading specification, can reasonably have been found by the jury to be an affirmation of fact or a promise concerning the actual durability or performance of the tower during the wind and ice storms to which it was likely to be subjected." *Id.* at 640 [A 7].

The Dresser catalog was given to Community to induce its purchase of a Dresser product (R 12-16, 1431-1434). Under South Dakota law, in the absence of clear affirmative proof to the contrary, the affirmation in the catalog must be considered part of the "basis of the bargain." *Id.; see also Drier* v. *Perfection, Inc.*,_____S.D.___, 259 N.W.2d 496, 502 (1977); SDCL 57-4-26; Comment 3, UCC § 2-313. "The law is clear that express warranties may be made in advertisements, pamphlets or brochures." *Drier* v. *Perfection, Inc., supra,* 259 N.W.2d at 503. *See also AES Technology Systems, Inc.* v. *Coherent Radiation,* 583 F.2d 933, 939 (7th Cir. 1978).[3]

[3]The fact that the catalog was given to Community to induce the purchase of the first tower is of no effect. The later tower was a duplicate and both parties looked extensively to the first transaction for the terms of their agreement (R 13-31, 119-173, 191-192, 373-375, 1118-1120, 1406-1419, 1432-1439, 1741-1742, 1744-1745, 1774-1777). As explained to the District Court by *Petitioner's counsel:* "[Y]ou see the '68 tower was virtually the same tower as the '66 tower and when they decided on the specifications for the '68 tower, you have to go back to the '66 tower to see what they negotiated for." (R 30).

Breach of Dresser's express warranty was proven when the tower failed to live up to its promised performance capacity.[4] *Drier* v. *Perfection, Inc., supra,* 259 N.W.2d at 504; *Swenson* v. *Chevron Chemical Co.*,____S.D.____, 234 N.W.2d 38 (1975). As noted by the Court of Appeals: "In view of the affirmation made in the catalog, there was sufficient evidence for the jury to reasonably find that the tower was not as durable as it was warranted to be." 586 F.2d at 641 [A 8].

B. *The Disclaimer Provision Was Not Applicable To The Express Warranties In The Dresser Catalog.* The disclaimer and limited remedy provisions (item 9) contained in the Dresser sales order do not mention the catalog warranty which Dresser had given Community. The item 9 provision refers *only* to the "applicable specifications" in the sales order itself — i.e., the specification that the components of the tower would sustain 60 psf on flat surfaces. Under these circumstances, the only reasonable interpretation that could be placed on the disclaimer and limitation of remedy provision, in light of the prior express warranties contained in the Dresser catalog, was that item 9 applied only to the component parts of the tower which failed to meet "applicable specifications." Thus, while item 9 may have provided an exclusive remedy should any component part fail to meet applicable specifications, it did not supersede the specific ex-

[4] Petitioner surmises that "the Court of Appeals adopt[ed] Petitioner's evidence that ice loading had caused the tower to collapse . . ." Petition at 11. Petitioner has misconceived the opinion in this regard. The Court of Appeals stated:

> "[T]he evidence does not support the conclusion that the wind alone, or the combination of wind and ice which Dresser claimed caused the collapse, was not within the range of storm conditions to be reasonably contemplated for the tower's location." 586 F.2d at 641.

Thus, the Court of Appeals found that *either* under the Respondent's theory or under the Petitioner's theory there was sufficient evidence to support the breach of warranty claim.

press warranties in the Dresser catalog which extended to the durability and performance capacity of the tower as a whole. The Court of Appeals for the Fifth Circuit has reached the same result in a similar situation. *S-C Industries* v. *American Hydroponics System, Inc.*, 468 F.2d 852, 855 (5th Cir. 1972).

C. *The Issues Upon Which The Eighth Circuit Based Its Decision Were Fully Argued In The Trial Court And On Appeal.* Petitioner's contention that it was deprived of its "day in court both at trial and in the appeal" (Petition at 13) is totally without foundation in the record. The inescapable fact is that the sales representations contained in the Dresser catalog and upon which the Eighth Circuit based its decision were an integral part of Community's case throughout the trial and appellate proceedings.

From the outset, Community's complaint made it clear that more was alleged than a mere breach of the 60 psf technical specification. Count III of the complaint specifically alleged that Dresser warranted to Community through "sales material and literature" that the tower was properly and safely constructed and that the tower was of sufficient strength to be suitable for its intended uses (Filing No. 1). The complaint further alleged that Community relied upon Dresser's warranties and that such warranties proved false (*Id.*).

The Dresser catalog was the first subject of inquiry at trial. A Community official testified that the catalog was given to him by a Dresser representative (R 12-15). The catalog was discussed during the negotiation process and Community relied upon it in deciding to purchase the Dresser tower (R 15-16). The catalog was the plaintiff's first exhibit. Petitioner's suggestion that it was received for a "limited purpose" is

simply incorrect.[5] The catalog was the first subject presented to the jury by Community's counsel during closing arguments (R 1811-1812). Dresser's counsel did not mention the catalog and failed to respond to Community's argument in this regard. The catalog representations were again brought to the attention of the jury in Community's rebuttal argument (R 1872-1874).

The District Court instructed the jury that the "[t]echnical specification constituted an express warranty that the structure would withstand wind exerting a pressure of 60 pounds per square foot on the flat surfaces of the tower." (R 1896). Significantly, the District Court also instructed the jury, *without objection*, as follows:

> "Now, *any affirmation of fact or promise made* by the seller to the buyer which reflects to the goods or product and becomes part of the basis of the bargain creates an express warranty that the goods or product shall conform to the affirmation or promise. *Such affirmation or promise may be oral or in writing.*
>
> Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description." (R 1985). (Emphasis added).

The District Court further referred to "any affirmation of fact or promise" in reading SDCL 57-4-26 to the jury and in setting out the essential elements of proof under the theory of breach of express warranty (R 1895-1897). If the 60 psf

---

[5] The trial transcript states:

Mr. Evans: Yes, I'm offering Exhibit 1.
The Court: Yes. Is there objection?
Mr. Doyle: Yes, we'll object on the basis that it's not material to any of the issues in the case.
The Court: The objection is overruled. Exhibit 1 will be received in evidence. (R 17-18).

The trial court commented later that Exhibits 1 and 2 might be superseded by a contract. The trial court, however, did not make such a ruling and Dresser never requested one (R 19-20).

specification were the only warranty at issue, there would have been no need to refer to an express warranty in these terms. More importantly, the District Court specifically refused Petitioner's requested instruction that the only warranty at issue in the case was the 60 psf specification.[6]

Petitioner's post-trial motions argued that the District Court improperly received "Plaintiff's Exhibit 1 into evidence." (Filing No. 36). The motions were denied, and Petitioner did not raise this issue on appeal.

Petitioner's assertion that the catalog warranty was never urged on appeal is also contrary to the record. Respondent's brief set out *verbatim* the catalog warranty and further stated that "[t]hese representations were discussed during the negotiation process and were relied upon by Community." [A 230]. Respondent's brief further stated:

> "The brochure was an integral part of the sales transaction; it explained the meaning of the 60 psf specification in detail. Under these circumstances, *the statements in the brochure also created express warranties.* 'The law is clear that express warranties may be made in advertisements, pamphlets or brochures.' " *Drier* v. *Perfection, Inc., supra,* ____ S.D.____, 259 N.W.2d at 502.
>
> On this appeal, Dresser now concedes the specification question created an express warranty as a matter of law. Appellant's Brief at 20. Presumably, Dresser's position is the same with reference to the statements in its brochure." [A 245] (Emphasis added).

---

6 Petitioner's requested instruction number 8 read in pertinent part:

> "The only express warranty that Plaintiff has raised as a basis for recovery in this case is that contained in the statement: 'The tower shall be designed to resist a uniform wind load per drawing T-5172, sheet s-1, 60 psf on flats.' "

Dresser did not file any of its requested jury instructions to make them a part of the record, but this requested instruction is set out in Dresser's motion to vacate judgment (Filing No. 36).

Indeed, although the catalog warranty argument was expressly relied upon by Respondent both at trial and on appeal, the Petitioner failed until now to respond in any manner. Petitioner's contention that the catalog warranty was somehow invented by the Court of Appeals runs directly contrary to the opinion itself: *"[W]e agree with Community* that the warranty was amplified, in advertising materials Dresser gave to Community . . ." 586 F.2d at 640 [A 6] (Emphasis added).

III. The Issues Presented By The Petitioner Were Not Properly Raised or Preserved Below.

The Petitioner contends that the opinion of the Court of Appeals overlooked the parol evidence rule in connection with the catalog warranty. This assertion comes too late.

Under South Dakota law, the trial court *must find* that a written agreement was intended by the parties as a final expression of their agreement before the parol evidence rule will be applied to exclude extrinsic warranties. SDCL 57-3-4. In *Drier* v. *Perfection, Inc.,* ____ S.D.____, 259 N.W.2d 496 (1977), the Supreme Court of South Dakota held that an integration clause almost identical to the one in the Dresser sales order could not serve to exclude oral warranties where no finding was made that the written contract was intended as a final expression of the parties' agreement. Like the trial court in *Drier,* the District Court in the instant case did not make a "finding of finality." Moreover, *Petitioner never requested such a finding.*

Petitioner did not assert the parol evidence rule in its objection to the introduction of the catalog at trial (R 17-18); nor did Petitioner mention the rule in its motions for directed verdict (R 1198-1208, 1788-1790). As noted above, Petitioner did not except to the jury instructions on the issue of express warranty and did not propose any "limiting instructions" to the effect that the catalog warranties should not be considered by the jury. The burden was on the Petitioner to raise

this issue before the trial and appellate courts and Petitioner failed to do so.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Dated: April 6, 1979

DAVENPORT, EVANS, HURWITZ
& SMITH
ELLSWORTH E. EVANS
DEMING SMITH
EDWIN E. EVANS
National Reserve Building
Sioux Falls, South Dakota 57102
Attorneys for Respondent
Community Television Services, Inc.